

# ILLEGAL ACTS - CONDITION OF LIABILITY FOR DAMAGES CAUSED IN EXERCISING LEGAL LABOR RELATIONS\*

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## **Abstract**

According to article 253 and 254 of Labor Code, both employers and employees are responsible under the rules and principles of contractual liability for damages to the other party of legal labor relationship and we emphasize that this is not purely civil liability, but a variety of it, determined by the specific peculiarities of legal labor relations. Thus, we highlight that labor law provisions which refer to liability for damages complement, unquestionably, with the common law relating to civil liability. The paper analyzes the objective basis of legal accountability, namely the illicit act causing damages committed in fulfilling labor duties or in connection tot hem, therewith the method detailed and comparative documentation of legislation in the field and relevant doctrine.

**Keywords:** legal liability, legal labor relationship, illicit act, damage, duties, exemption from liability.

**JEL Classification:** K31

## **1. General considerations**

Legal labor relations, viewed in a narrow sense<sup>2</sup>, have their origin in valid individual labor contract, defined by article 10 of the Labor Code as *a contract under which one person, called the employee undertakes to perform work for and under authority of an employer, individual or legal person, in return for remuneration referred salary*. We will not consider relations of independent workers or other persons who, by law, do not carry subordinated work, subordination being the cornerstone for any individual labor contract. Moreover, the doctrine states that labor law does not apply to any other freelancers and self-employed persons or under special laws or are members of directors boards, auditors etc<sup>3</sup>. Also exceed the scope of legal labor relations activities based on a civil contract, and not on an individual labor contract in any of its forms, in which case damages caused ensures accountability through civil law.

The study is dedicated to analyzing the objective basis of the liability for damages caused during exercising legal labor relations not only in terms of Labor Code, but as those of Civil Code that are applicable in the researched field. Thus, we will consider the elements that determine the specific if illegal act causing damages and the causes which removing this character, exonerates from liability the perpetrator.

## **2. Specifics of illegal act - condition of liability for damages caused in the exercise of legal labor relations**

Illegal act was defined as the act which contravenes the norms of objective law and infringes a subjective right of the injured person<sup>4</sup>. In the matter under review, the wrongful act is the

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<sup>2</sup> *Lato sensu*, by legal labour relations we understand legal service relations, too.

<sup>3</sup> For details, see Alexandru Țiclea, *Tratat de dreptul muncii. Legislație. Doctrină. Jurisprudență*, 7th edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2013, p.10; Alexandru Athanasiu, Magda Volonciu, Luminița Dima, Oana Cazan, *Codul muncii. Comentarii pe articole. Vol.I, articolele 1-107*, C.H.Beck Publishing House, Bucharest, 2007, p.2-3.

<sup>4</sup> Ion M. Anghel, Francisc Deak, Marin F. Popa, *Răspunderea civilă*, Scientific Publishing House, Bucharest, 1969, p.74. Also see Ion Dogaru, Pompil Drăghici, *Bazele dreptului civil. Volumul III. Teoria generală a obligațiilor*, C.H.Beck Publishing House, Bucharest, 2009, p.268.

action or omission in connection with work, causing injury, committed with guilt and consisting in breach of employment law (legal rules, internal regulations, individual labor contract or applicable collective labor agreement to orders and statutory hierarchical provisions). We note that in case of an illegal act of the employee meeting the constituent elements of the disciplinary offense as defined by article 247 paragraph 2 of the Labor Code, we have to deal with an accumulation of liability for damage to the disciplinary one, without thereby to undermine the *non bis in idem* principle, as these are two distinct forms of legal liability, each in order to protect their proper social relationships. Therefore, characterization of an act as illegal one depends on the content of legal labor relation and the prejudice of law protected values.

Means to commit the illegal act are irrelevant to its existence, it is important that the damage will be caused by the employee *while performing labor duties*, namely that the act is committed *in connection with his job*. The doctrine<sup>5</sup> was considered that "act committed in connection with work" is broader than that of "offense committed in the performance of work", which is likely to include any omissions regarding labor duties too. This specific identification is usually done in conjunction with the job description, annexed to the individual labor contract. *Per a contrario*, causing injury as a result of facts which do not meet noted specific is beyond legal labor relations, being the sole responsibility of civil law to restore the violated values<sup>6</sup>. However, we remember that under paragraph 1 of article 1272 of Civil Code, valid individual labor contract compels not only to what is expressly stipulated but also to all the consequences that occur under laws - sources of labor law, internal regulations, collective labor contract, orders and statutory hierarchical provisions. As such, the mere lack of job description or the incomplete one does not lead to exemption from patrimonial liability of the legal labor relation parties<sup>7</sup>, on the grounds that you cannot determine labor duties, as wrongly considered in judicial practice<sup>8</sup>. The fact is that it is for the courts to determine whether and to what extent an act causing injury is work-related, based on the evidence given by the employer to this effect so that there could intervene the liability for damages caused in the exercise of legal labor relations, otherwise the liability that would be determined in charge of the perpetrator has an exclusive civil nature.

With regard to the time and place it occurred, we believe that the illegal act may be committed either during working hours or outside working hours, so in unity or its annexes and beyond the material of the unit in which the employee works<sup>9</sup>, and also at work where he was delegated or temporarily transferred. So there are no place or time conditions to the existence of the illegal act.

Regarding perpetration of *acts causing injury to the employer / employee committed in during exercising labor duties or in connection to them, but outside working hours*, that in the time allotted for recreation and rest, we think that is likely to attract liability for damages to the perpetrator.

On the other hand, committing acts causing damages during working hours or which were possible only because the perpetrator was a party of a legal labor relation, do not cause

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<sup>5</sup> Sanda Ghimpu, Alexandru Țiclea, *Dreptul muncii*, 2nd edition, All Beck Publishing House, Bucharest, 2001, p.617.

<sup>6</sup> Also see, Suceava Court of Appeal, Labor disputes and social insurance division, decision no 648 / 2007 in Buletinul Curților de Apel no 2 / 2008, p.69-70.

<sup>7</sup> Also see Ion Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii*, 2nd edition revised and enlarged, Universul Juridic Publishing House, Bucharest, 2012., p.780. For the same point of view in judicial practice, see Bucharest Court of Appeal, 7th division of civil and labor disputes and social insurance, civildecision no 909/R/2007 in Lucia Uță, Florentina Rotaru, Simona Cristescu, *Dreptul muncii. Răspunderea patrimonială, contravențională și penală. Practica judiciară*, Hamangiu Publishing House, Bucharest, 2009, p.115.

<sup>8</sup> Bucharest Court of Appeal, 7th division of civil and labor disputes and social insurance, decision no 6486/R/2011 in „Revista română de dreptul muncii” no 1/2012, p.214-215.

<sup>9</sup> The unit material includes the usual workplace or outside, doorways, annexes, including deposits, ramps, social spaces (dorms, cafeterias, clubs), transportation, retail spaces etc – Ion Traian Ștefănescu, *Tratat...*, *op.cit.*, p.712, note no 1.

patrimonial liability, but civil one, whenever there cannot be established a *connection with labor duties*<sup>10</sup>.

Patrimonial liability of employees is always personal, even in the case of liability of the employees with leadership positions with or in place of those who committed the damage, they do not respond to facts of another, but for their own actions<sup>11</sup> on how they have fulfilled their service duties.

Regarding the patrimonial liability of employers to their employees we must distinguish between employer as individual and as legal person. In the first case, the wrongful act is personal act of the employer, while in the second case the infringements committed by the governing and managing bodies of the legal person commits the legal person itself under article 219 paragraph 1 of the Civil Code, provided that they are in connection with the duties or functions assigned. Acts committed by the bodies of legal person exceeding the mandate given are not the facts the legal entity, and as such, will not draw patrimonial liability of the employer, but the simple civil liability of the perpetrator. In both situations, the employer has the prerogative of delegation duties to employees, which is why the article 253, paragraph 3 of Labor Code provides that an employer who has paid the compensation will retrieve the related amount from the employee guilty of lead damage. In this case, the employer's liability is a personal one based on *culpa in eligendo* in terms of choosing the person / persons appointed to act in the name and on his behalf.

In conclusion, in the matter under investigation, labor law does not recognize the institution of vicarious liability<sup>12</sup>. In case of damage caused to third parties by employees during exercising labor duties, recovery of damages is governed by the rules of employer's liability for the acts of their employees, as the principals of the latter.

### 3. The quality of the perpetrator as part of a legal labor relation

In terms of quality perpetrator, note that it must be part of a legal relationship of employment, a condition which must be fulfilled at the time of committing the tort and not at the time intervening legal accountability. The subsequent ending of the labor relation for any reason does not preclude the legal regime of liability.

Then bring to attention some special situations:

- *legal basis of liability for damages in relation apprentice-employer*. According to article 208 paragraph 2 of Labor Code, the apprentices operate under a particular type of individual labor contract, generically called apprenticeship contract at work. If the disciple is causing injury to his employer or vice versa, the liability engaged will be patrimonial one governed by rules established by Labor Code. I base my opinion on the provisions of article 6, paragraph 2 of Law no 279 / 2005 on discipleship at work<sup>13</sup>, according to *the conclusion, performance, amendment, suspension and termination of apprenticeship contract are in compliance with Law no 53/2003 - Labor Code, republished, with subsequent amendments, relating to apprenticeship and individual labor contract*.
- *liability for damages in case the individual labor contract is modified by delegation or posting to another unit - binding measures taken by the employer*. In case of delegation, because there is no legal relationship between the delegated employee and unity that has been delegated to, in order to recover damages suffered, the injured unit has the following options<sup>14</sup>: a) to sue the offender under article 1357 Civil Code governing tort liability for the

<sup>10</sup> Sanda Ghimpu, Alexandru Țiclea, *op.cit.*, p.617.

<sup>11</sup> See Ion Traian Ștefănescu, *Tratat...*, *op.cit.*, p.780; Alexandru Țiclea, *Tratat...*, *op.cit.*, p.887.

<sup>12</sup> See Bucharest Court, 4th civil division, decision no 371/1992, *Culegere de practică judiciară civilă pe anul 1992* (adnoted by Ioan Mihuț), „Șansa” S.R.L. Publishing House, Bucharest, 1993, p.208-209.

<sup>13</sup> Republished in the Official Gazette of Romania, Part I, no 498 / 7.08.2013.

<sup>14</sup> Also see Ion Traian Ștefănescu, Șerban Beligrădeanu, *Codul muncii prezentare de ansamblu. Analiza textelor esențiale. Textul integral*, Lumina Lex Publishing House, Bucharest, 2003, p.109; Ion Traian Ștefănescu, Șerban Beligrădeanu, *Prezentare de*

personal acts, given that there is no contractual relationship between delegated employee and the unit where he was delegated to; b) to proceed against the employer who decided to delegate on the basis of the contract with it and in the execution of which has been ordered delegation - contractual liability. The existence of such a contract is likely to refrain from applying rules of other forms of legal liability than the contractual parties considered more favorable under paragraph 3 article 1350 Civil Code. If there is no legal contractual relationships between the employer and the unit where ordered the delegation will become incidents tort liability rules established by the Civil Code article 1373, having the capacity of principal of the delegated employee, the employer is held responsible for the damages caused; c) in case of employer's tort liability, not contractual one, to claim compensation from both the employer and the delegated employee, their responsibility being an *in solidum* one. *In solidum* liability differs from the solidarity, that it operates under the law for the tort committed by another, and not for personal act, which is why there is the right of recourse of the person who paid the compensation against the perpetrator.

Whenever the employer repairs any damage caused by employees, regardless of the legal basis of his liability, there is his right of recourse against the employee for damages covered, building on the article 253 paragraph 3 Labor Code.

Regarding liability for damages suffered by the delegated employee during fulfilling labor obligations or in connection with them, it will fall on the employer who decided to delegate because the work is provided in its interest. The legal basis of liability is the article 253 of Labor Code. Of course, if proven the guilt in causing the damage of the unit where delegation was ordered to, the employer could turn against it by action for recovery based on rules of contractual liability if the delegation was ordered to enforcement of a valid bilateral act or, failing that, on the rules of tort liability for the own acts of that unit.

Regarding the posting, this means that a posted employee working for and under the authority of the transferee employer, according to article 45 Labor Code, which requires that the legal relations between the parties mentioned are governed by the rules applicable to legal labor relations. Likewise, the doctrine<sup>15</sup> states that there is a temporary assignment of the individual labor contract between the posted employee and transferor employer. Hence the conclusion that the liability for damages will be one asset by specific labor law rules. We note that the obligation to repair the damage suffered by the employee seconded to the execution of or in connection with the service belongs to the transferee employer. Pursuant to article 47 paragraph 4 and 5 of the Labor Code if it fails to fulfill its obligation, the repair will be the responsibility of the transferor employer and in case of disagreement, the employee has the right to pursue remedies against any of them to obtain enforcement the obligation.

- *liability for damage caused in the exercise of legal labor relations through temporary employment.* According to article 88 et seq of the Labor Code, work through temporary employment is work performed by a temporary employee who has a contract with a temporary employment agency and made available to the user under a contract in order to temporarily work under the supervision and direction of the latter. We formulate the point of view that, to recover damages caused by the temporary employee, the user has to hand the following possibilities: either to proceed against the employee based on tort liability for the acts of its own, given that between the two there is no legal contractual relationships or to recourse against temporary work agent, this is a contractual liability since the damage was caused in the execution of the contract for work provision, temporary work agent being able to regress against the perpetrator as shown above. As long as the temporary employment agency may rely on paragraph 3 of article 253 Labor Code to recover compensation paid, do

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ansamblu și observații critice asupra noului Cod al muncii, „Dreptul” no 4/2003, p.73; Ion Traian Ștefănescu, *Tratat ...*, op.cit., p.778.

<sup>15</sup> Ion Traian Ștefănescu, *Tratat...*, op.cit., p.778.

not see why there would be no direct action against the employee, although it may represent a less favorable for the victim. Also remember article 1519 Civil Code which provides that unless the parties agree otherwise, the debtor is liable for damage caused by negligence of the person who is used to execute contractual obligations. We ask whether this form of legal liability - vicarious liability precludes the possibility of punishing the offender - tort liability for the acts of its own. We appreciate that the answer is negative without thereby infringing the provisions of paragraph 3 of article 1350 Civil Code which enshrine the principle of *avoiding choice between contractual and tort liability*<sup>16</sup>. This is because the legal text is to be interpreted as meaning that there cannot be removed rules of contractual liability for tort liability as long as we consider same legal responsible relationship established between the same parties. In conclusion we cannot adhere to the view expressed in the doctrine<sup>17</sup> that "the user cannot claim damages *ex delictu* directly from the employee the damages have been produced; user can make only an *ex contractus* action for damages against temporary work agent".

Furthermore, for a more comprehensive analysis there must be solved the problem of determining to whom belongs the fault in causing the damage suffered by the temporary employee in the course of or in connection with the service. According to article 98 paragraph 1 of Labor Code, the user answers during the mission to ensure working conditions for temporary employee in accordance with the law. However, the actual conditions of work are stipulated in the contract for work provision between the user the employer, as imperatively provided in article 91, paragraph 2, letter c Labor Code. The systematic interpretation of the two legal texts shows that temporary employment agency is responsible for defining how the work is to be construed by the temporary employee, hence the conclusion that it will be bound repair the damages suffered by this employee. Of course, provided proving user's guilt, the first may turn against the second one under the contract for work provision to recover compensation paid. Incidentally, this is the best solution in terms of which it is normal to create the temporary employee's conviction that he enjoys the protection of the law to recover damages suffered, at least in theory.

#### 4. Cases eliminating the unlawful nature of the act

As a rule, the liability for damages is engaged whenever the general conditions are met (the illicit act, damage, causation and guilt), the liability could not exist in the case of the absence of one of them. In reality, situations may arise where certain specific circumstances existing at the time the act occurred, leading to the conclusion that, in fact, the author has no unlawful conduct and that, consequently, disclaimer is necessary<sup>18</sup>. These cases are, therefore, given by reality and that impedes the conditions required for liability.

In this context we mention the provisions of article 254 paragraph 2 Labor Code, which states that *employees are not responsible for damages caused by force majeure or other unforeseen causes that could not be removed and nor for damages falling within the normal risk of service*. From the fact that the legislature did not distinguish between the two categories of cases excused from liability – those which remove the unlawful nature of the act (as normal risk of service) and those that remove guilt (such as force majeure and fortuitous event<sup>19</sup>), we understand that the focus is put on their effect - removing responsibility and not on its causes. However we believe that such

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<sup>16</sup> This principle reprezintă the legal implementation of doctrinal points of view. For elder doctrine, see Mihail Eliescu, *Răspunderea civilă delictuală*, Academiei RSR Publishing House, Bucharest, 1972, p.62; Constantin Stătescu, Corneliu Bîrsan, *Drept civil. Teoria generală a obligațiilor*, 3rd edition, All Beck Publishing House, Bucharest, 2000, p.137 și urm.

<sup>17</sup> see Ion Traian Ștefănescu, *Tratat...*, op.cit., p.778.

<sup>18</sup> Alexandru Țiclea, *Tratat...*, op.cit., p.849.

<sup>19</sup> For the opinion that force majeure and fortuitous event are causes that removes the unlawful nature of an act, see Alexandru Țiclea, *Răspunderea pentru daune în raporturile de muncă. Teorie și jurisprudență*, Universul Juridic Publishing House, Bucharest, 2014, p.124.

sharing of the causes which exclude from liability is welcomed, which is why we will continue to address the causes which remove the condition that is the subject of the study. We identify as labor law specific causes normal risk of service and exercising labor rights or fulfilling of a superior's order, plus borrowed from common law causes namely self-defense, the state of emergency, the consent of the victim.

Fulfilling a lawfully issued order excuses the perpetrator from liability, which means that, *per a contrario*, the execution of an illegal order does not release the employee from liability for damages<sup>20</sup>. In principle, the employee is not required to assess the suitability of a single order received, in such a case, but the superior, who gave the order, by hypothesis inappropriate, is always held responsible<sup>21</sup>. However, we share the view that those employees who have the management and control tasks are deemed to have the minimum level of knowledge and preparation for the exercise of their functions, so they are obliged to oppose the execution of the unlawful provisions received<sup>22</sup>. The legislature does not make any reference to how to act if the employee receives from the employer an order which he considers illegal. To fill this legislative gap, doctrine<sup>23</sup> rightly recourse to the method of interpretation by analogy, in order to apply the rules within Law no 188 / 1999 on the status of public servants to the legal labor relation. Thus, according to article 45 paragraph 3 Law no 188 / 1999, public servant is entitled to refuse in writing and reasoned, fulfilling orders received from superiors, that he considered illegal. However, the public servant is obliged to execute the instructions received in writing, on the reason of subordination in labor relations, unless they are manifestly illegal. Public servant has the duty to notify such situations to the supervisor of the person who issued the order. However, if the order is illegal, an official who executed it will not be liable to liability, provided they have traveled preliminary procedure prescribed by law. Liability will return only one who persisted in giving an illegal order.

We recall provisions of article 11 paragraph 5 of the Government Decision no 1256 / 2011 on establishing and operating conditions and the procedure of organizing temporary employment<sup>24</sup>, according to which the temporary employee is entitled to refuse in writing assignments, provided by temporary work agent, which endanger his life, physical and mental integrity. It further provides that such a refusal "cannot provide grounds for sanction or dismissal". The intervention of the legislature in this regard was imperative given that the employee's refusal to execute the mission could draw primarily disciplinary, and secondly liability for damages caused by its refusal, if any, under the temporary labor contract between temporary employee and agent. However, we believe the legislature expressing is defective because dismissal is itself a disciplinary sanction and propose the following wording "the employee's refusal is made in writing and shall not constitute grounds for sanctions".

We conclude that the execution of a lawfully issued order is a case of non-liability, but only for the employee regarding damages caused to the employer. This is because, if the employee suffers an injury in the line of duty, including superior order execution, article 253 Labor Code expressly establishes the employer's obligation to repair the damage caused thereby.

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<sup>20</sup> For opinions that execution of an legal service order excludes disciplinary liability, see Ion Traian Ștefănescu, *Tratat...*, *op.cit.*, p.750 și urm.; Dan Țop, *Tratat de dreptul muncii*, Wolters Kluwer Publishing House, Bucharest, 2008, p.463. Also see Leontina Constantina Duțescu, *Ordinul de serviciu ilegal, cauză exoneratoare de răspundere disciplinară*, „Revista română de dreptul muncii” no 5/2007, p.107.

<sup>21</sup> Ion Traian Ștefănescu, *op.cit.*, p.453. For opposite opinion that in case of an obvious illegal service order, execution refusal is justified, permitted and even mandatory, see Virgil Pop, *Răspunderea disciplinară a magistraților*, „Studii de drept românesc” no 1-2/1996, p.99.

<sup>22</sup> See Leontina Constantina Duțescu, *Ordinul de serviciu ilegal...*, *op.cit.*, p.107; also see Brîndușa Vartolomei, *Dreptul muncii pentru învățământul economic*, Economics Publishing House, Bucharest, 2009, p.143; Virgil Pop, *op.cit.*, p.99.

<sup>23</sup> Șerban Beligrădeanu, Ion Traian Ștefănescu, *Răspunderea civilă reciprocă între părțile raportului contractual de serviciu al funcționarului public*, „Dreptul” no 4/2009, p.92.

<sup>24</sup> Published in Official Gazette of Romania, Part I, no 5/ 4 ianuarie 2012.

Borrowing effects that conscience clause inserted in the individual labor contract produces in disciplinary matters<sup>25</sup>, we appreciate that it can be treated as an non-liability for damages asset where the employer would suffer any prejudice if invoked by the employee such a clause. Conscience clause is a favorable clause to employee that allows him to not to execute a legal labor order, if such would be contrary to his conscience, on religious, moral, political, scientific grounds etc. In this context, provisions of article 1355 Civil Code become incidents. As such, non-liability clauses are permitted only in terms of material damage caused by simple imprudence or negligence and not on those caused by intentional or grossly negligent. Disclaimer proving the employee requires, in each case, the correlation between service order and appearance of consciousness referred clause. The field of action for such a clause is represented only by permissive legal rules, the employee could not invoke the conscience clause in order to evade legal obligations imposed by mandatory rules<sup>26</sup>.

Another specific noteworthy patrimonial liability in this context is the inability to incorporate in the individual labor contract clauses that employees liability would be aggravated under article 38 of Labor Code which provides, under penalty of nullity, that employees may not waive their rights recognized by law. However, we appreciate that it is perfectly possible to negotiate mitigation of liability clauses for employees, as shown above. Without this type of clauses, the employer's consent as victim to remove the patrimonial liability of the employee is likely when the employer agreed even before production the damage that the employee act in a certain way, assuming the risk of paying the prejudice caused<sup>27</sup>. The opposite is the employer, where it is possible the worsening of liability by contract as appreciated in doctrine<sup>28</sup>, and not limiting or excluding it. On the same reasons, we consider that the ads regarding employer liability, made pursuant by article 1356 Civil Code, have no legal effects on the labor law liability. But ads that exclude or limit the liability of employee may be admitted as causes excused from liability if the employee proves that the injured party, in this case the employer, knew of the existence announcement at the conclusion of the individual labor contract.

The employer or employee who exercises rights recognized by labor law cannot be considered to harm the interests of the other, not having taken any unlawful conduct – *qui suo jure utitur neminem laedit*. To support this claim, we question article 1353 Civil Code, according to *the one who causes injury by the very exercise of his lawful rights is not obliged to pay any compensation, unless the right is exercised abusively*. By abuse of right we understand, under article 15 Civil Code, the exercising of a right in order to damage the interests of others, excessive exercise, unreasonable and contrary to good faith.

Regarding the *normal risk of service* (factors inherent to the work process) – excused from liability of the employee concerned, it is of two kinds: standard risk and abnormal risk. The target standard risk is inherent in production losses<sup>29</sup>, falling within perishable rules, consumption norms and internal limits of technological losses<sup>30</sup>. Where losses were not subject of norms, taking into account the specifics of that activity is possible finding that some accidental leakage, producing a relatively insignificant damage in relation to work done are not attributable to the employee, operating as the cause of exoneration<sup>31</sup>. Predictability risk of the losses falling within the normal

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<sup>25</sup> Alexandru Țiclea, *op.cit.*, p.420.

<sup>26</sup> Monna-Lisa Belu Magdo, *Răspunderea disciplinară în sistemul general al legislației muncii*, „Revista română de dreptul muncii” no 1/2005, p.62.

<sup>27</sup> See Vlad Barbu, Gheorghiu Valeria, Vasile Cătălin, *Instituții de drept civil*, Cermaprint Publishing House, Bucharest, 2006, p.210.

<sup>28</sup> Ion Traian Ștefănescu, *Tratat ...*, *op.cit.*, p.773.

<sup>29</sup> *Ibidem*, p.790.

<sup>30</sup> See Lucia Uță, Florentina Rotaru, Simona Cristescu, *Codul muncii adnotat I, Vol. I. Art. 1-153. Legislație. Jurisprudență națională și comunitară. Doctrină și comentarii*, Hamangiu Publishing House, Bucharest, 2009, p.618.

<sup>31</sup> Vlad Barbu, Vasile Cătălin, Dumitrache Ștefania, *Curs universitar de dreptul muncii*, Cermaprint Publishing House, Bucharest, 2011, p.244.

risk of the service is the specificity of this non-liability cause<sup>32</sup>. Losses that exceed the normal risk, normal or abnormal, attract patrimonial liability of the employee who is guilty.

*Self-defense* produces same non-liability effect for both criminal liability and the liability for damages. The Civil Code is limited to determining through article 1360 paragraph 1 that *once the perpetrator causing damages is in self-defense, he will not owe compensation*. However, the legal definition of self-defense is enshrined in the Criminal Code<sup>33</sup>. Thus, there is in self defense the employee who commits the deed in order to remove material directly, immediately and unjust attack, that threatens his person, or another, the employee or employer alike, their rights or interest, if defense is proportional to the seriousness of the attack. The assumption that we are in terms of liability that is the subject of present research, is the act committed is causing damage. Because the act is deemed to have been committed in self-defense, there are required to be fulfilled the following conditions<sup>34</sup>:

- having an attack, action or inaction;
- attack is material, that is exercised by physical means, through action or inaction likely to endanger a targeted value; does not meet this condition written or verbal attack, consisting of threats or insults;
- being a direct attack, meaning that it is to be directed and to create an immediate danger to a certain value;
- being an immediate attack, that the danger appeared to have already produced (actual risk) or is about to occur (imminent danger);
- being an unjust attack, which means it has no legal basis that allows or justifies this kind of behavior; to establish its unjust nature we must take into account the nature of the attack, the mental attitude of the perpetrator, the relationship between aggressor and victim etc .;
- being directed against the employee who is defending or against another person or a general interest;
- endangering the employee, another person, their rights or interests, that is likely to cause irremediable or hard to remove harm to protected values. We believe that the severity of the hazard condition must subsist being justified by the effects they produce, in terms of legal liability, in general;
- materializing the defense act in an act which violates the law, the applicable collective labor contract, the individual labor contract or orders and legal provisions of superiors;
- defense is being necessary to remove the attack; defense is legitimate only insofar as it is directed against the act aggressively and seeks its removal and the danger he creates;
- defense must be proportionate to the seriousness of the attack, something that is appreciated by time of the offense, depending on the means used and the circumstances of the offense.

Paragraph 2 of article 1360 Civil Code states that *who has committed a crime by overcoming the limits of self-defense will be required to pay appropriate and fair compensation*. So this is a drawing of tort in a criminal proceeding, which aim is to convict the one who is guilty of a defense that not only meets the above conditions, but constitutive elements of a crime, which determines us to leave the field of labor law and to enter into the civil law<sup>35</sup>.

*State of emergency*, indentified as another non-liability cause, is provided by article 1362 Civil Code<sup>36</sup>. The hypothesis that we take into consideration is that the illegal act was committed to defend the person or the property of the perpetrator of a harm or imminent danger. Although the Civil Code does not contain any reference in this respect, we consider applicable rules enshrined in

<sup>32</sup> Also see Ion Traian Ștefănescu, *Tratat...*, op.cit., p.791.

<sup>33</sup> Article 19 of new Criminal Code, Law no 286/2009, published in Official Gazette of Romania, Part I, no 510 / 4.07.2009.

<sup>34</sup> For details in criminal doctrine, see Costică Bulai, Bogdan N. Bulai, *Manual de drept penal. Partea generală*, Universul Juridic Publishing House, Bucharest, 2007, p.241-249; Alexandru Boroi, *Drept penal. Parte generală. Conform Noului Cod penal*, C.H.Beck Publishing House, Bucharest, 2010, p.242-249.

<sup>35</sup> See article 1362 C.civ.

<sup>36</sup> In the new Criminal Code, state of necessity is provided by article 20.

article 20 Criminal Code. These state that will not be state of emergency and therefore liability will be incurred if the person who committed the offense realized that inflicts tracked are obviously more serious than those that would have been produced if the danger was not removed. As considered in criminal doctrine<sup>37</sup>, the conditions for the existence of the state of emergency refer to the danger on the one hand and to the offense committed on the other hand, as follows:

- there is an imminent danger that is about to produce evil that threatens one of the values protected;
- imminent danger threatens life, limb or health of the employee, employer or another natural person or an important asset of one of these or a general interest;
- risk must be unavoidable and cannot be removed in some other way that does not involve causing a damage;
- the offense committed is necessary to save the values mentioned above;
- by the act should not follow obviously more serious damage than those that would be produced if the danger were not removed;
- the employee had not been obliged to face the danger, according to the individual employment contract ended and that job description.

Therefore, the state of emergency is concerned cause that excuses from liability, but the one whose values were protected by the act recorded has an unjust enrichment at the expense of the victim of the injury, so will be held to indemnify the latter under article 1345, article 1362 et seq. Civil Code. An application of this rule in matters of property, Civil Code is represented by article 624 which provides that *where a person has used or destroyed the property of another to defend himself or another from imminent danger, the property owner is entitled to fair compensation only from one who has been saved, unless the owner himself caused or favored the danger.*

Finally we discuss the non-liability cause represented by granting disinterested aid to the victim by the perpetrator, provided by article 1354 Civil Code. We consider such a question is incompatible with the consideration of the legal labor relations, especially since the intervention of patrimonial liability of employee or employer, the illegal act must have been committed in the line of duty or in connection with it, which cannot be assimilated to a disinterested assistance<sup>38</sup>.

## 5. Conclusions

At the end of the research to conclude that liability for damages in labor law, as well as contractual liability, revolve around the idea of restoring civil rights violated, but there is no absolute community of elements between those two, in the sense that in labor law it is required that damage is a result of committing an illegal act of an employee in performing labor duties or in connection therewith. Where no established their specific rules of labor law, we resort to rules of civil law, on its role of common law in matters of private law<sup>39</sup>. All these are essential cues for shaping the objective basis of liability for damage caused in the exercise of legal labor relations.

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<sup>37</sup> See Costică Bulai, Bogdan N. Bulai, *op.cit.*, p. 249-255; Alexandru Boroii, *op.cit.*, p.249-253.

<sup>38</sup> For the opposite opinion, see Ion Traian Ștefănescu, *Tratat...*, *op.cit.*, p.789.

<sup>39</sup> See Gheorghe Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil*, 11th edition revised and enlarged by Marian Nicolae, Petrică Trușcă, Universul Juridic Publishing House, Bucharest, 2007, p.16-17.

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